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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1970

MILLER-DAVIS COMPANY, a Corporation,

Petitioner,

vs.

PREMIER ELECTRICAL CONSTRUCTION COMPANY, a Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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The respondent, in its brief opposing certiorari, suggests a novel theory upon which to sustain the judgment of the Seventh Circuit Court of Appeals. Respondent argues that because its alleged theory of recovery in the instant case is based upon the antitrust laws this fact alone should preclude the application of the doctrine of *res judicata*. In support of this argument respondent cites *Lawlor v. Na-*

tional Screen Service Corp., 349 U.S. 322 (1955). Respondent also relies upon the *Lawlor* decision for the proposition that the doctrine of *res judicata* is inapplicable even though both suits involve "essentially the same course of wrongful conduct". Clearly, the *Lawlor* decision is not authority for either of these propositions. In *Lawlor* the conduct complained of in the second lawsuit was *all subsequent to the judgment entered in the earlier lawsuit.* Thus, this Court at p. 328 succinctly stated the essence of its decision:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

In addition, the interpretation given to the *Lawlor* decision by the respondent is completely answered by the Eighth Circuit Court of Appeals in *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964).

The importance and substantiality of the questions presented by us are not denied by respondent. The respondent takes the position that the Court of Appeals was correct but does not deny that recent decisions of other Courts of Appeal referred to on pages 12 through 14 of our Petition are in conflict with this decision of the Seventh Circuit.

Respondent has shown no reason why this Court should not grant certiorari to review and bring down to date the scope of *res judicata* in light of the relatively recent liberal pleading provisions of the Federal Rules of Civil Procedure. Moreover, this Court should reverse the Seventh

Circuit's highly restrictive application of the identity-of-causes-of-action test which itself is outmoded and inconsistent with the liberal rules of pleading in the Federal Courts.

Respectfully submitted,

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September 23, 1970